CASE SUMMARY

Complaint against a doctor of the Hospital Authority for falsely stating that the complainant had not requested to see the District Judge or Magistrate

The Complaint

The complainant complained against a doctor of the Hospital Authority (HA) for falsely stating in the "Certificate of a medical practitioner in support of application for removal of a patient to a mental hospital for the purpose of detention and observation" (hereinafter referred to as "the medical certificate") issued under the Mental Health Ordinance that he "had not requested to see the District Judge or Magistrate".

Background Information Provided by the Complainant

2. The complainant was admitted to the Accident and Emergency Department of a hospital under HA on account of sudden acts of violence and unstable mental condition. A doctor of the hospital issued a medical certificate under the Mental Health Ordinance for his removal to another HA hospital for further assessment of his mental condition. After his eventual discharge, the complainant obtained a copy of the medical certificate from the second hospital and found that the doctor had stated in the medical certificate that he "had not requested to see the District Judge or Magistrate". The complainant asserted that he simply did not know he could make such a request, and that he had never indicated that he did not wish to do so.

3. Feeling aggrieved that he had been removed to a mental hospital for detention and observation without being informed of his rights, he lodged a complaint with The Ombudsman.

Observations and Opinions

Comments from HA

4. According to HA, after the complainant's admission to the first hospital on account of sudden acts of violence and unstable mental condition and being administered tranquilizers, his mental condition remained unstable. The doctor therefore decided to refer him to a second HA hospital for further assessment of his mental condition in accordance with procedures stipulated in the Mental Health Ordinance. HA admitted that before issuing the medical certificate for his removal, the doctor had not informed the complainant that he could request to see a District Judge or Magistrate.

5. HA stated that the Mental Health Ordinance did not stipulate that the doctor should take the initiative to inform the patient of his right to see the District Judge or Magistrate before he issued the medical certificate. Although when a patient was admitted to a mental hospital for

detention and observation, hospital staff would explain to him and his relatives that he was admitted to the hospital under Section 31 of the Ordinance.

6. HA stated that it had not formulated any guidelines on the admission of a patient to a mental hospital for detention and observation over and above those stipulated under Section 31 of the Mental Health Ordinance. Generally speaking, before a doctor issued a medical certificate, he would arrange for the patient to meet the District Judge or Magistrate if the patient had so requested. However, the doctor would not take the initiative to inform the patient that he could make such a request. This was because the great majority of patients requiring admission had little knowledge of the disease or awareness of their own mental condition, most would refuse to go to a hospital voluntarily. If doctors had to inform such patients that they could make such a request, most would ask to see the District Judge or Magistrate. This might result in serious delays in hospital admission, with possible unexpected and disastrous outcome. For example, some patients might hurt themselves or other people, or they might run away.

Comments from the Health and Welfare Bureau (HWB)

7. This Office noted that the medical certificate was a form devised for the purposes of Section 31 (1A) of the Mental Health Ordinance. The form required the doctor to state whether "The patient has/has not requested to see the District Judge or Magistrate". As the policy bureau responsible for the Ordinance, HWB was asked by this office to state the purpose of this requirement and to advise whether the law required the doctor to take the initiative before issuing the medical certificate to inform the patient that he had the right to make the request.

8. According to HWB, the Mental Health (Amendment) Bill 1987 (the Bill) was gazetted by the Government on 19 June 1987 and the purpose of Clause 4 of the Bill was to make amendments to Section 31 of the Mental Health Ordinance. The then Legislative Council (LegCo) set up an ad hoc group to examine the Bill. After nearly a year's deliberations, the Bill was passed on 22 June 1988. Subsequent to the addition of Section 31 (1A) and (1B) to the primary legislation, HWB amended the wording of the medical certificate accordingly.

The Official Record of Proceedings of the LegCo

9. Research by this Office indicated that at the LegCo meeting on 22 June 1988, the Honourable Rosanna WONG Yick-ming and the Honourable Martin LEE Chu-ming respectively spoke on the right of the patient to be brought before the judge or magistrate. Excerpts from their speeches and the

response from the Secretary for Health and Welfare are at the Appendix.

Legal Advice given to HWB by the Department of Justice

10. In response to our specific question, HWB explained after consulting the Department of Justice that Section 31 of the Mental Health Ordinance did not state explicitly that the doctor had the legal responsibility to ask the patient if he wished to see the District Judge or Magistrate. The wording of the medical certificate could be interpreted as the doctor had the responsibility to passively record what the patient said. However, such responsibility did not include taking the initiative to ask the patient if he wished to see the District Judge or Magistrate.

Opinion

11. This Office noted that the original purpose of the Bill was to stipulate that the doctor should inform the patient of his right to be brought before a judge or a magistrate. This was evident from the speeches of the Honourable Rosanna WONG Yick-ming and the Honourable Martin LEE Chu-ming during the second reading of the Bill. At the Committee Stage, the Honourable Rosanna WONG Yick-ming also pointed out that the doctor who signed the medical opinion should be required to ask the patient whether or not he wished to see a judge or magistrate before the decision was made. The then Secretary for Health and Welfare did not object to Honourable Members' views. However, the present complaint had shown that the Administration and HA had failed to put in place the necessary administrative measures in accordance with the original purpose of introducing the Bill.

12. After deliberations, The Ombudsman concluded that the doctor concerned had simply followed the general procedures of HA in sending the complainant to the mental hospital. According to the procedures, the doctor did not have to take the initiative to inform the complainant that he had the right to request to see the District Judge or Magistrate before the issue of a medical certificate under the Mental Health Ordinance for his removal to a hospital. As a matter of fact, the complainant had not made such a request. Therefore, it was not improper for the doctor to have stated on the medical certificate that the complainant had not requested to see the District Judge or Magistrate. In view of this, The Ombudsman considered that the complaint against the doctor was **unsubstantiated**. However, The Ombudsman considered that the relevant administrative measures had failed to discharge the legislative intention of the Bill and she suggested that the authorities concerned should review those measures in the light of the history of this legislation.

13. The Ombudsman was pleased to note that HA had approached the Judiciary for discussions on how appropriate and effective arrangements could be made to discharge the legislative intention of Section 31 of the Mental Health Ordinance. Such arrangements would require doctors to take the initiative to inform patients of their right to see a District Judge or a

Magistrate before a medical certificate is issued under Section 31 of the Mental Health Ordinance. The Ombudsman recommended that HA should actively discuss with the Judiciary and report the progress to this Office regularly.

Response from HA

14. HA had no comment on the Investigation Report.

Response from HWB

15. HWB concurred with our view that it was stated in the Official Record of Proceedings of the LegCo that the original purpose of the Bill was to require the doctor to inform the patient of his right to be brought before a judge or magistrate, and that the then Secretary for Health and Welfare had raised no objection to this point. HWB indicated that neither Section 31(3) of the Mental Health Ordinance nor the medical certificate specifically required a doctor to ask the patient whether he wished to see the District Judge or Magistrate. However, HWB considered that the patient should be informed of his right to make such a request and agreed that it would be more appropriate for a doctor to inform the patient of this right. HWB had discussed with the Judiciary and HA the details of implementation and it would also follow up this matter.

Final Remarks

16. The Ombudsman hoped that HWB and HA would reach an early agreement with the Judiciary with a view to formulating the necessary measures to fulfil the original purpose of the Bill in safeguarding the rights of mental patients.

Office of The Ombudsman
Case Ref. : OMB 1999/3066
June 2000

Appendix

Extracts from The Official Record of Proceedings of the Legislative Council

Excerpts from the speech made by the Honourable Rosanna WONG Yick-ming at the resumption of debate on the second reading of the Bill

“The group has received representations from the Bar Association, suggesting mandatory hearing by a judge or magistrate before a decision is made. Recognising that detentions in a mental hospital will have significant repercussion on a person’s life, the group has proposed a compromise, that rather than making a hearing mandatory in every case, such persons should be given the right to be heard by a magistrate or judge, and should be informed of such right and be given the opportunity to exercise it if they so wish.”

Excerpts from the speech made by the Honourable Martin LEE Chu-ming at the resumption of debate on the second reading of the Bill

“I understand that the Administration will provide a safeguard by way of subsidiary legislation in stipulating in the requisite prescribed form that the doctor concerned shall inform the patient of his right to be brought before a judge or magistrate……As an additional safeguard, and in order to make the present proposal meaningful, I suggest that the relevant question be only put to the patient in the presence of a relative, or if such a relative cannot be found (for example, as in the case of a street sleeper) then in the presence of a social worker; and that this be catered for in the prescribed form ……my proposal will not only ensure that the right to be heard can be safeguarded in the interest of the patient, but it will also afford protection to the doctor concerned because he will have a witness who is of sound mind to back him up if there be a subsequent dispute that the question has not been asked of the patient.”

Excerpts from the speech made by the Secretary for Health and Welfare at the resumption of debate on the second reading of the Bill

“Mrs. TAM has described the various amendments which we have agreed with the ad hoc group and which she will move in Committee, and I will not go into details on these points.”

“I have noted Mr. Martin LEE’s reservations in connection with the right of a person believed to be suffering from mental disorder to be heard by a judge or magistrate and his suggestion that the question of whether he wishes to exercise this right should be put to him in the presence either of a relative or a social worker. We shall certainly give careful consideration to this suggestion.”

Excerpts from the speech made by the Honourable Rosanna WONG Yick-ming at the committee stage of the Bill

"I move that clauses 2, 4, and 7 be amended as set out in the paper circulated to Members......The amendment to clause 4 recognises the need to protect the interest of patients who are liable to be committed to detention in a mental hospital......The amendment also limits the authority to make such orders to only district judges and magistrates and requires them to see the patient if the patient so requests. The doctor who signs the medical opinion will be required to ask the patient whether or not he wishes to see a judge or magistrate before the decision is made. In this context, the certificate mentioned in the proposed new subsection 3(b) to section 31 will be an integral part of the form containing the medical opinion. This form will be prescribed in the subsidiary legislation which will follow enactment of the Bill. The form will be subject to Legislative Council supervision."